

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Amendment of Section 73.3555(e) of the)	
Commission's Rules, National Television)	MB Docket No. 17-318
Multiple Ownership Rule)	
)	

COMMENTS OF NEWSMAX MEDIA, INC

America's broadcast television rules are predicated on ensuring free and local television to all Americans. When applying for a broadcast license, a broadcaster and the government enter into a social contract, in which the government grants access to scarce spectrum resources and a broadcaster agrees to serve a local community by providing local programs, news, and shows relevant to that community. Over the last 15 months, this FCC has systematically eliminated many of the structural underpinnings that ensure broadcasters remain connected to their local communities. The relaxation of local television ownership rules, elimination of the main studio rule, and, now, this proposed rulemaking to increase or eliminate the national television audience reach cap rule ("National Ownership Cap") remove the regulatory underpinnings that keep broadcast television local.

This is particularly concerning, because while broadcasters seek to shed the regulations that ensure their obligations to serve the local community, they continue to demand the regulatory benefits they have received in exchange, such as free spectrum, a statutory copyright license, must-carry and retransmission consent rights, and market

exclusivity protections. Quite simply, broadcasters want to have their cake and eat it too. A national cable and online news network, Newsmax is very concerned about the Commission's review of the broadcast television National Ownership Cap granting more power to broadcasters. By nationalizing their footprints, broadcast ownership groups are able to use the tools meant to ensure free and local content to force out competition from independent programmers and raise pay-TV prices. Independent programmers, including Newsmax, have previously raised these concerns with regard to Sinclair Broadcasting Group's acquisition of Tribune Media Company. For example, One World Sports has said it understands that "Sinclair Television's recent acquisition of The Tennis Channel was predicated on its strategy of leveraging the retransmission consent rights of Sinclair's many broadcast stations to coerce MVPDs to agree to greatly expanded carriage of The Tennis Channel."¹ INSP, citing Sinclair's acquisition of The Tennis Channel, noted that "conglomerates [are] overwhelmingly dominating the acquisition pattern and further strengthening their hold on the multichannel marketplace."²

Newsmax appreciates the opportunity to comment on this Notice of Proposed Rulemaking (NPRM) on National Ownership Cap and the population discount afforded to UHF stations ("UHF Discount"). This important issue has been in regulatory flux since at least 2016, but actually dates back to the digital television transition. In 2016, the Commission eliminated the UHF Discount, finding that UHF stations were no longer technically inferior to VHF stations following the digital television transition and that the

¹ See Reply Comments of One World Sports, MB Docket No. 16-41, at 4-5 (filed Apr. 19, 2016).

² See Comments of INSP, LLC, MB Docket No. 16-41, at 16 & n.16 (filed Jan. 26, 2017).

competitive disparity between UHF and VHF stations had disappeared.³ However, the FCC subsequently granted a Petition for Reconsideration arguing the elimination of the UHF Discount effectively tightened the National Ownership Cap without also determining whether the national cap remained in the public interest. This rendered the 2016 UHF decision arbitrary and capricious.⁴

The FCC has a mandate to promulgate the rules based on Congressional intent, in the case of the National Ownership Cap, Congress clearly intended to prohibit a single broadcast television licensee from reaching more than 39 percent of the national audience. This cap is statutory, and it cannot be modified by the Commission in this rulemaking. This intention is clear; while Section 202 of the 1996 Telecommunications Act previously required the Commission to review its rules to determine whether they could be eliminated in light of changing market conditions or other factors, Congress subsequently excluded the National Ownership Cap from its review at the same time it statutorily codified the 39 percent cap in 2004. If Congress intended the Commission to revise the National Ownership Cap on a regular basis, it would not have set definitive cap percentages in 1996 and 2004 respectively, and it would not have specifically exempted the National Ownership Cap from the quadrennial review. In fact, the Commission knows full well that the authors of the 39 percent National Ownership Cap did not intend a future FCC to modify it. In Commissioner O’Rielly’s statement on this very NPRM he recalls “former Senator Ted Stevens screaming that, if some station group wanted to go

³ *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Report and Order, 31 FCC Rcd 10213, 10226-33, paras. 28-40 (*UHF Discount Elimination Order*).

⁴ *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, Petition for Reconsideration of ION Media Networks and Trinity Christian Center of Santa Ana, Inc., MB Docket No. 13-236 (filed Nov. 23, 2016) (Petition for Reconsideration).

above 39 percent, they could come to Congress to try to get the cap amended.”⁵ Yet here we are.

This NPRM is based entirely on the flawed notion that the National Ownership Cap and the UHF Discount are “inextricably linked” and eliminating the UHF Discount has had the effect of expanding the scope of the National Ownership Cap.⁶ Again, as Commissioner O’Rielly notes, “[s]ome, including the Third Circuit Court of Appeals, have argued that Congress only meant to remove consideration of the national audience reach cap from the biennial review, not to prohibit it from being changed as part of any other effort. But such a reading is preposterous as it would effectively create one of the biggest backdoors in the history of legislating. At the same time, the view ignores the deal that was struck in those bitterly heated Member meetings and huddles.”⁷

Taken a step further, if we are to assume the National Ownership Cap and the UHF Discount “are inextricably” linked, the Commission could have completely undermined the Congressional preemption codified in the CCA by raising the UHF Discount from 50 percent to 60 or 70 percent in an effort to manipulate the now statutory 39 percent cap to the 45 percent national ownership cap it originally sought.

Congress clearly intended to prohibit a single broadcast television licensee from more than 39% of the national audience, and the UHF Discount is not a loophole around this hard cap. The UHF Discount is simply a mechanism to ensure parity amongst the disparate broadcast television spectrum bands. The only question the FCC needs to

⁵ See NPRM statement of Commissioner O’Rielly

⁶ *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Report and Order, 31 FCC Rcd 10248 (dissenting statement of then-Commissioner Pai).

⁷ See NPRM statement of Commissioner O’Rielly

address in this NPRM is if, after the digital transition, there is any deficiency with UHF spectrum that requires a discount in population calculations to achieve regulatory parity between the bands. That question has already been answered. The NPRM notes, “the Commission’s experience since completion of the DTV transition confirms that UHF channels are technically equal, if not superior, to VHF channels for the transmission of digital television signals.”

Congress has also weighed in on the UHF Discount as a regulatory and technological relic as part of the broadcast incentive auction. Section 6403(b)(3)(A) of the Spectrum Act specifically prevented the Commission from reassigning a broadcast television licensee from an ultra-high frequency television channel to a very high frequency television channel.⁸ If UHF frequencies remain inferior and prevent broadcast television licensees from reaching viewers, why would Congress have statutorily prevented the FCC from offering broadcasters a VHF channel? The answer is because broadcasters, the same ones now urging the Commission to restore the UHF Discount, lobbied Congress to ensure they did not receive the less valuable VHF spectrum as part of the broadcast television auction or subsequent repacking.

The NPRM seeks comment on whether changes in the marketplace warrant a fresh look at the National Ownership Cap’s impact on competition or diversity at either the local or national level. Given that the national cap rule is statutory, this is a political question, not a regulatory one. Therefore, it is a moot point in this proceeding. Nevertheless, changes in the television landscape should have no impact on how the Commission should view its ownership rules. Broadcasters are the recipients of scarce

⁸ Middle Class Tax Relief and Job Creation Act of 2012, PL 112-96. February 22, 2012.

spectrum resources, airwaves that belong to the public, provided free to broadcasters in exchange for a commitment to localism. The hallmark of localism is broadcast stations invest in their community, employ members of their communities, and provide local programming focused on their community. In contrast, station groups are assembled to maximize economies of scale, extract synergies and efficiencies by reducing newsroom staffs, and homogenizing content across multiple stations. Ownership rules ensure localism; this is why the ownership caps were initially instituted and why they are still relevant today. If station groups find localism too constraining on their business plans, they can simply relinquish their spectrum rights and offer their content on any number of new and unregulated platforms or they can become national cable channels and seek carriage without the benefit of retransmission consent rights.

Perhaps one of the most worrisome concerns is the impact ownership cap rulemaking will have in the area of local news. According to a recent Pew study, local television news is still the primary way Americans get their news. The collapse of local newspapers and the failure of major internet outlets like Google, Youtube, Facebook and other content providers to offer local news platforms has made local television news increasingly important. Raising the National Ownership Cap (coupled with the elimination of the main studio and the elimination of local ownership rules) will lead to the centralization and homogenization of local news and programming. There will also be a greater risk of manipulation of news by national players. The Commission will open the doorway for a few major corporate players to control most of the local broadcast stations in the nation. Such a concentration of media power is dangerous to our democracy. A free press necessitates a diverse press. The Commission's efforts to

undermine the National Ownership Cap flies in the very face of the agency's mandate to provide diverse and local programming to communities throughout the United States.

In summary, the impetus of this NPRM is rooted in a flawed view of the National Ownership Cap. It is clear the Commission does not have the authority to modify the 39 percent cap, and the UHF Discount cannot be used as a loophole to this Congressionally mandated rule. As a result, the Commission has no choice but to enforce the 39 percent ownership cap. Given that the previous Commission, the current FCC, and Congress have all determined that UHF spectrum is no longer inferior, the FCC must sunset this regulatory relic as well.

Respectfully submitted,

/s/

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